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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1940

No. 950

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO,
Petitioner,

vs.

A. CAMINETTI, JR., INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the State of California
and
BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the State of California.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

A.

SUMMARY STATEMENT OF MATTER INVOLVED.

The insurance company whose rights are involved in this proceeding is Physicians Life Insurance Company, and that concern is and for some years prior to August 15, 1940 was a corporation organized and existing pursuant to the provisions of Chapter 9, Part 2, Division 2 of the Insurance Code of the State of California, and during and at such times was solvent and was engaged in life and health and accident insurance business, and had approximately 18,000 members and policyholders, and during all of such time maintained its principal office and conducted its business in the City and County of San Francisco, State of California. (R. p. 21.)

On August 15, 1940 the Insurance Commissioner of the State of California, purporting to act under Section 1011 of the Insurance Code of such State, commenced a proceeding in the Superior Court of the State of California, in and for the City and County of San Francisco, against Physicians Life Insurance Company, and on that day the Court in which such action was commenced, upon the Commissioner's application therefor, without notice to the insurance company, made its order authorizing and permitting the Insurance Commissioner to summarily seize the assets and business of Physicians Life Insurance Company and to take exclusive possession, management and control thereof, and vesting title to the assets in such Commissioner. (R. pp. 15-17.)

On or about August 15, 1940, and after the seizure of the assets and the taking possession of the office

and business of such insurance company, the Insurance Commissioner, purporting to act under Section 1040 of the Insurance Code, removed or claimed to have removed the principal office of such insurance company from the City of San Francisco to the City of Los Angeles, and on August 16, 1940 (R. p. 3) applied to petitioner Court for an order directing its clerk to transmit all the papers filed therein and the proceeding to the clerk of the County of Los Angeles. (R. pp. 17-18.)

The petitioner Court denied such application and refused to make such order, giving as its reason therefor that Section 1040 of the Insurance Code did not authorize or empower the Insurance Commissioner to remove the principal office of the insurance company from the City and County of San Francisco to the City of Los Angeles.

As before stated, the principal office of Physicians Life Insurance Company was in the City and County of San Francisco, and Section 1011 of the Insurance Code requires that proceedings of the character brought by the Insurance Commissioner shall be commenced in the Superior Court of the county in which such principal office is maintained, and the petitioner Court, being of the opinion that the Insurance Commissioner had neither power nor authority to remove the principal office of the insurance company from San Francisco to Los Angeles, refused to make the order transferring the cause from petitioner Court to the Superior Court of Los Angeles County. (R. p. 22.)

It will be noted too that Section 1040 of the Insurance Code does not provide for notice of removal of office and the proceedings or of hearing thereon, either before or after such removal, and that not elsewhere in the laws of the State of California is such notice or hearing provided for.

On August 29, 1940 an original proceeding was commenced by respondent Commissioner in the Supreme Court of the State of California against the petitioner Court, in which it was prayed that petitioner Court be restrained from further proceeding in the pending action, and it was therein claimed that the principal office had been removed from San Francisco to Los Angeles, and that the demand for the transfer of the cause had been made and that following such removal the demand for the transfer of the cause from petitioner Court to Los Angeles should have been granted. (R. pp. 1-6.)

The Supreme Court of the State, as appears by its opinions, copied in the printed transcript filed herewith (R. pp. 32-42), held that Section 1040 of the Insurance Code authorized and empowered the Insurance Commissioner to remove the principal office of Physicians Life Insurance Company from San Francisco to Los Angeles, and that the things done by the Commissioner in this regard had effected such removal. The Court further held that by reason of such removal, upon the application of the Commissioner, it became the duty of the petitioner Court to direct its clerk to transmit the papers in such pro-

ceeding to the clerk of the County of Los Angeles. (R. pp. 32-42.)

There is no provision in the laws of the State of California requiring the insurance concern involved to be notified of the intention to remove the office or the proceedings, or of such removal, nor is there any provision of law under which hearing as to the propriety of such removal may be had, nor is any opportunity for hearing afforded the insurance company affected.

That notice of hearing or opportunity to be heard was not provided for by any statute was first called to the attention of the Supreme Court of the State, after the case was decided, by a petition for rehearing. (R. pp. 52, 62-63, 43-49.) In the petition for rehearing it was contended that Section 1040 of the Insurance Code, as construed by the Supreme Court, offended against the Due Process and Equal Protection clauses of the Fourteenth Amendment to the Federal Constitution. The Supreme Court denied the petition for rehearing without opinion. (R. p. 65.)

This case was heard and considered in conjunction with three other cases of like or similar character. One of such cases involved the Mount Moriah Life Insurance Company and the facts of that case were substantially the same as the facts in this case, and the main opinion was filed in the case involving the Mount Moriah Life Insurance Company. (R. pp. 32-41.) The opinion rendered in this case adopted the opinion rendered in the *Mount Moriah Life Insurance Company* case. (R. p. 42.)

B.

QUESTIONS PRESENTED.

1. Is Section 1040 of the Insurance Code of the State of California, as construed by the Supreme Court of the State, repugnant to the Due Process clause of the Fourteenth Amendment of the Federal Constitution?

C.

STATEMENT OF JURISDICTION.

(a) The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended. (U.S.C., Title 28, Section 344 (b).)

(b) The statute of the State, the validity of which is involved, is found in Division 1, Part 2, Chapter 1, Article 14 of the Insurance Code of the State of California, as amended by the Statutes of 1935, Chapter 291, and being Section 1040 of the Insurance Code. That section reads:

> "At any time after an order is made under sections 1011 or 1016, the commissioner may remove the principal office of the person proceeded against to the City and County of San Francisco or to the city of Los Angeles. In event of such removal, the court wherein the proceeding was commenced shall, upon the application of the commissioner, direct its clerk to transmit all of the papers filed therein with such clerk to the clerk of the City and County of San Francisco or of the county of Los Angeles as the case may require. The proceeding shall thereafter be con-

ducted in the same manner as though it had been commenced in the county to which it had been transferred."

(c) The judgment sought to be reviewed and a reversal of which is asked was made and filed in the Supreme Court of the State of California on January 6, 1941 (R. p. 42), and the petition praying for rehearing of the cause was presented and filed on January 24, 1941 (R. p. 50), and on February 3, 1941 the petition for rehearing was denied without opinion. (R. p. 65.) The judgment of the Court became final on February 6, 1941, and this petition for writ of certiorari is presented and filed within the time provided by the rules of this Court. There is presented herewith a certified and printed copy of the record in the case, in which the judgment complained of was rendered.

(d) The claim that Section 1040 of the Insurance Code, as construed by the Supreme Court, violated the Due Process clause of the Fourteenth Amendment of the Federal Constitution was directly presented to the Supreme Court by the petition for rehearing.

It is because of this denial of constitutional right by the State Court that petitioner is compelled to ask this Court for certiorari, and petitioner's right so to come to this Court is supported by authorities cited in petitioner's brief accompanying this petition.

D.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

1. The decision of the Supreme Court of the State of California is in conflict with the Due Process clause of the Federal Constitution, for it so construes Section 1040 of the Insurance Code of the State of California that it withholds from and denies to Physicians Life Insurance Company that due process of law guaranteed to it by the Fourteenth Amendment to the Federal Constitution, for the construction given to such section by said Court empowers the Insurance Commissioner to remove the principal office of said company and the proceeding against it from the City and County of San Francisco to the County of Los Angeles, without according to the insurance company a hearing or an opportunity to be heard relative to the reasons or necessities or propriety of such removal, and denies to them an opportunity to show the evils, the damage and the injury to such company and its business which will result from such removal.

2. The matter in issue is of great public importance since it affects the business and property of 18,000 members and policyholders of the Physicians Life Insurance Company. The magnitude of the question involved further appears for the decision affects every insurance company, its members and policyholders operating in the State of California, now under conservatorship or in liquidation, or which may here-

after, under the Insurance Code, pass into the control of the Insurance Department of the State either in conservatorship or in liquidation.

The propriety of the application to this Court becomes more apparent when it is remembered that the question involved has never been decided by any Court, except in the instant case.

The decision of the two Courts are in direct conflict.

The decision of petitioner Court so construes Section 1040 as to give it effective operation without offending due process, while the decision of the Supreme Court of the State gives to the section a construction which denies to the insurance company the due process which is assured to it by the constitutional provision.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of California, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket S. F. No. 16,480, A. Caminetti, Jr., Insurance Commissioner of the State of California, Applicant, v. Superior Court of the State of California in and for the City and County of San Francisco, Respondent, and that the decree of said Court may be reversed by this Honorable Court, and that your petitioner may have such other and further

relief in the premises as to this Honorable Court may seem meet and just.

Dated, San Francisco, California,
April 11, 1941.

SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO.
By FRANK T. DEASY,
Presiding Judge,
Petitioner.

U. S. WEBB,
HESTER WEBB,
Counsel for Petitioner.

In the Supreme Court
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United States

OCTOBER TERM, 1940

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SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO,
Petitioner,

vs.

A. CAMINETTI, JR., INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE DECISIONS OF THE COURTS BELOW.

The opinions and decisions of the Supreme Court of the State of California, the correctness of which are here challenged, are set forth on pages 32-40 of

the Transcript of Record and at page 42 of the Transcript of Record. The dissenting opinion of Justice Edmonds appears in the Transcript of Record at pages 40 and 41.

The judgment sought to be reviewed and reversal of which is asked was filed in the Supreme Court of the State of California on January 6, 1941, and the petition praying for rehearing was denied on February 3, 1941, without opinion. The judgment of the Court became final on February 6, 1941.

II.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended. (U.S.C., Title 28, Section 344 (b).)

III.

STATEMENT OF THE CASE.

The insurance company whose rights are involved in this proceeding is the Physicians Life Insurance Company and it is now and for some years prior to August 15, 1940 was a corporation organized and existing pursuant to the provisions of Chapter 9, Part 2, Division 2 of the Insurance Code of the State of California, and during such times was solvent and was engaged in life and health and accident insurance business, and had approximately 18,000 members and

policyholders, and during all of such time maintained its principal office and conducted its business in the City and County of San Francisco. (R. p. 21.)

On August 15, 1940 the Insurance Commissioner of the State of California, assuming to act under the authority conveyed by Section 1011 of the Insurance Code of such State, commenced a proceeding in the Superior Court of the City and County of San Francisco against Physicians Life Insurance Company, and on that day, upon the application of the Insurance Commissioner, the Court in which this action was pending made its order authorizing the Insurance Commissioner to summarily seize the assets and business of Physicians Life Insurance Company and to take possession, management and control thereof, and vesting title to the assets in such Commissioner. (R. pp. 15-17.)

On August 15, 1940, and after the filing of the petition in the above mentioned proceeding, the Insurance Commissioner, claiming to act under Section 1040 of the Insurance Code, removed or attempted to remove the principal office of the insurance company from the City of San Francisco to the City of Los Angeles, and on August 16, 1940 applied to the petitioner Court for an order directing its clerk to transmit all the papers filed in such proceeding to the clerk of the County of Los Angeles. The petitioner Court denied the application to transfer the proceedings to the County of Los Angeles and, upon the application of Physicians Life Insurance Company, issued its injunction restraining the Insurance

Commissioner from removing the principal office of the insurance company or taking any steps in an effort to transfer the pending action to the County of Los Angeles. (R. pp. 2, 21-22.)

It was the view of petitioner Court that Section 1040 of the Insurance Code did not authorize the Insurance Commissioner to remove the principal office of the insurance company from San Francisco to Los Angeles, and that such section of the Code did not authorize the Superior Court, upon the application of the Commissioner, to transfer the proceeding from the Superior Court in which it was pending to the Superior Court of Los Angeles County. (R. p. 22.)

The petitioner Court continuing to exercise jurisdiction in such proceeding, on August 29, 1940 the Insurance Commissioner commenced in the Supreme Court of the State of California an original proceeding against the petitioner Court, praying that such Court be restrained from further proceedings in the case, and that the Court be directed to transfer said cause to the Superior Court of Los Angeles County. (R. pp. 1-6.) On the following day the Supreme Court of the State caused to be issued in said action an alternative writ of prohibition returnable October 1, 1940. (R. pp. 26-27.)

On September 26, 1940 petitioner Court filed its return to such writ. (R. pp. 20-26.)

Upon the issues thus joined a hearing was had which resulted in the decisions of the Supreme Court hereinbefore cited, and in the granting of a peremp-

tory writ of prohibition and mandate. (R. pp. 66-67.) That writ directed petitioner Court to desist and refrain from further proceedings in the pending action and contained the following mandatory provision:

> "* * * we do hereby further command you, the said Superior Court and Thomas M. Foley, the Judge thereof, to transfer that said entitled proceeding or matter to the Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, in conformity with the Conservator's removal of the principal office of the above named insurer and in pursuance of his application for such transfer, as authorized by statute."

In obedience to the mandate, the case was transferred from San Francisco to Los Angeles February 11, 1941 (R. pp. 67-68), where it is still pending, not having yet come to trial.

That Section 1040 of the Insurance Code, as construed by the Supreme Court, offended against the Due Process clause of the Fourteenth Amendment of the Federal Constitution was first urged upon the attention of the Court by the petition for rehearing, in which it was said:

> "This section (1040) vests arbitrary power in the Commissioner to so remove the principal office of the company, together with the proceeding, without notice or hearing and without any provision whatever for notice or an opportunity to be heard.
>
> "Clearly, these three sections of the Insurance Code, accepted and approved by the Court as

> granting to the Insurance Commissioner the powers complained of, have resulted in denial of equal protection of the laws to Physicians Life Insurance Company and in deprivation of the property and assets and the very entity of that concern without due process of law in derogation of the Fourteenth Amendment to the Constitution of the United States." (R. pp. 62-63.)

And again in the concluding paragraph of the petition it was said:

> "* * * we think it is clear that the decision denies to the Physicians Life Insurance Company the equal protection and due process guaranteed by the Fourteenth Amendment to the Federal Constitution, and we think it manifest that, in the opinion of the Court, Section 1040 has been misapplied, incorrectly interpreted and erroneously construed." (R. p. 63.)

IV.

SPECIFICATIONS OF ERROR.

1. The Supreme Court of the State erred in its decision that Section 1040 of the Insurance Code authorized and empowered the Insurance Commissioner to remove the principal office of Physicians Life Insurance Company from San Francisco to Los Angeles.

2. The Supreme Court of the States erred in holding that Section 1040 of the Insurance Code authorized and empowered the Insurance Commissioner to transfer, or cause to be transferred, the pending ac-

tion from the Superior Court of the City and County of San Francisco to the Superior Court of the County of Los Angeles.

These specifications of error are each based upon the fact that in neither instance does Section 1040 of the Insurance Code, or any other provision of the laws of the State of California, provide for notice, hearing or opportunity to be heard.

V.

AUTHORITIES AND ARGUMENT.

It should be stated at the outset that this petition for certiorari does not involve any question relative to the proceeding commenced by the Insurance Commissioner on August 15, 1940 against the Physicians Life Insurance Company. (R. pp. 9-15.) That proceeding was commenced in the county in which the Physicians Life Insurance Company maintained its principal office as provided by Section 1011 of the Insurance Code, and the order authorizing the Insurance Commissioner to take possession of the business and assets of the insurance company was made under the authority of that section. Though the order was applied for and made and the seizure was effected without previous notice to the insurance company, Section 1012 of the Insurance Code, reading as follows:

> "Said order shall continue in force and effect until, on the application either of the commissioner or of such person, it shall, after a full

> hearing, appear to said court that the ground for said order directing the commissioner to take title and possession does not exist or has been removed and that said person can properly resume title and possession of its property and the conduct of its business."

provides for a full hearing relative to the propriety of such seizure and for a return of title and possession to the insurance company "if it be found that the cause alleged in the petition did not exist or has been removed".

Complaint is here made of the removal of the principal office of the insurance company from San Francisco to Los Angeles, and the legal ground for such complaint is that the statutes of California do not provide that the insurance company shall be given notice of the intention to remove, or of such removal, and do not provide for a hearing relative thereto either before or after the act of removal.

The second ground of complaint springs from the removal of the proceeding from the jurisdiction of the Court in which it was, in accordance with the command of the statute commenced, to the Superior Court of Los Angeles County, without notice of the application for removal or of removal, and without opportunity to be heard relative thereto, either before or after the removal had been ordered, and there is no statute in the State of California requiring that such notice be given or such hearing or opportunity to be heard be accorded to the insurance company. It is this absence of notice or hearing and

of opportunity to be heard that raises the question of due process.

The laws of the State of California, as do the laws of other states, require that insurance corporations as well as other corporations have an office. The office of an insurance concern is the instrumentality wherein and by which the concern is operated, directed and controlled. It is the place where applications for insurance are received, considered and approved or rejected. It is the place where claims for loss are presented, considered and determined. It is the place where premiums and other obligations due the company are received and where losses are paid. It is the place where its minutes, papers, records, books and accounts are kept. It is the instrumentality through which an insurance concern lives and has its being. To the office the agency organization reports and from the office they receive their direction. It is the means whereby good will is created, fostered and maintained. It is property in the highest sense of the term and an indispensable requisite to the operation of an insurance business.

Frequently, questions of taxation are determined by the place where the principal office is maintained. Likewise the jurisdiction of Courts in litigation in which the company may be involved is determined by the corporation's residence or place where its principal office is maintained.

The 18,000 members and policyholders of the Physicians Life Insurance Company are vitally interested in the place where its principal office is located and

in the maintenance of such principal office at the place where located by its charter.

Stanton v. State Tax Commission (Ohio), 159 N. E. 340.

So also is it a matter of important concern to the public.

Frick v. Norfolk etc. R. Co., 86 Fed. 725;
Alabama Clay Products Co. v. City of Birmingham (Ala.), 148 So. 328.

That the public and the members, policyholders and stockholders of a corporation have an interest in the place where the principal office is maintained and would be affected by a change in location of that office is so well recognized by the authorities that we will not extend this brief by citation of numerous cases.

That in the exercise of the functions of the corporation by an Insurance Commissioner, acting as conservator, there might arise an occasion where it would be advisable to change the place of the principal office we do not question, but such change should only be made where it is established that advantage to the corporation will result from such change, and the corporation should be afforded an opportunity to show that such advantage would not result and that great detriment to the corporation would follow such change. Subject to the right of those adversely affected to be heard, a discretion is vested in the Insurance Commissioner. That discretion, however, is a legal or judicial discretion, which should always be exercised in subordination to the best interests of

the concern whose business temporarily he is conducting.

What has been said as to the first assignment of error applies with equal force to the second.

The Physicians Life Insurance Company was a party to the original proceeding, is still a party, and its continued life or death is to be determined in such proceeding. That it should have an opportunity to oppose the transfer of the case from the Court in which, by requirement of statute, it was commenced to a jurisdiction more than four hundred miles distant is evident.

That occasions might arise during the administration of the conservatorship, when it would seem to the conservator that a change of venue would be advisable need not be questioned, but the insurance concern should have notice of his desire to change or of his efforts to change the venue, and an opportunity to show that evil and not advantage would result should such change be made.

It was said in *Roller v. Holly,* 176 U. S. 398:

> "That a man is entitled to some notice before he can be deprived of his liberty or property is an axiom of the law to which no citation of authority would give additional weight; * * *"

In *Riverside & D. R. Cotton Mills v. Menefee,* 237 U. S. 189, this Court said:

> "That to condemn without a hearing is repugnant to the due process clause of the 14th Amendment needs nothing but statement. * * * And that a corporation, no more than an individual,

> is subject to be condemned without a hearing, or may be subjected to judicial power in violation of the fundamental principles of due process as recognized in Pennoyer v. Neff, is also established by the cases referred to and many others."

The principle which we urge in support of each assignment of error was forcibly stated in the very late case of *Morgan v. United States,* 304 U. S. 1. In the opinion practically every phase of the question is reviewed and we quote only briefly from it. At pages 14 and 15 it is said:

> "The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing,'—essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an 'inexorable safeguard.' "

And at page 18 it was said:

> "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; other-

wise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command. * * *"

And at page 20 it was said:

"* * * The requirements of fairness are not exhausted in the taking or consideration of evidence but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps."

The following rule is stated in 12 C. J. 1203:

"The established principles of law must be adhered to in all matters affecting jurisdiction and venue, and departure from them constitutes a denial of due process of law."

Even if notice had been given and hearing accorded through extra-official action of the Commissioner, such notice and hearing would have been unavailing. Notice and hearing must be given in conformity with the statute requiring such.

Coe v. Armour Fertilizer Works, 237 U. S. 413.

It seems appropriate here to refer to certain pronouncements in the opinion of the Supreme Court of the State which could hardly have been made with the requirements of due process in mind.

In the opinion (R. p. 35) it is said:

"It is difficult to believe that the legislature intended that for the duration of a temporary

> control by the commissioner there should be a complete removal of books, assets and business which would tend to dissipate and ruin the business of a company subjected thereto."

And on the following page (R. p. 36) the opinion states:

> "It appears in the present case that the conservator removed the Minute Books of the company to Los Angeles in effective compliance with his prior written declaration of removal of the 'principal office' of the Mount Moriah (Physicians) Life Insurance Company from San Francisco to Los Angeles. By affidavit it appears that the transfer of other books and records of the company was impossible because of the auditing thereof by Examiners. Then, too, the restraining order issued by the respondent court intervened."

However difficult it may be to believe that the Legislature intended to give to the Commissioner the power to remove the office with all of its equipment, including books, papers and records customarily kept there, under the section as construed by the Supreme Court, the Commissioner has such power. Though at the time the minute books only had been removed, the intention to remove the entire office equipment including the books and records, is shown by the affidavit referred to by the Court. The books, papers and records, as shown by the affidavit, were kept in the old office for the purposes of audit and, as suggested in the opinion, because of the restraining order against their removal issued by the lower Court.

It is unimportant that the entire office equipment had not been removed for, in the opinion of the Court, the Commissioner had the power to effect complete removal, and it is the power to remove, without notice or hearing, of which complaint is made. The objection to the statute as construed by the Supreme Court rests upon the power to achieve the evil and not on the fact of having done it. The question is not whether the wrong has been done, but it is whether the power to do it is conferred.

In *Stuart v. Palmer,* 74 N. Y. 183, 30 Am. Rep. 289, it is said:

> "The constitutional validity of a law is to be tested, not by what has been done under it, but what may, by its authority, be done."

This rule is quoted approvingly by Justice Cardozo in *People ex rel. Alpha Portland Cement Co. v. Knapp,* 230 N. Y. 48, at page 54, and also approved in *Montana Co. v. St. Louis Mining etc. Co.,* 152 U. S. 160.

We have heretofore pointed out that the exercise of this power of removal would work great detriment and damage to the insurance concern, and the Supreme Court expresses its agreement with this view and in the quotation from the opinion already made states that the removal of books, assets and business "would tend to dissipate and ruin the business of a company subjected thereto." (R. p. 35.)

In reference to the purpose of the removal it is stated in the opinion (R. p. 35):

> "The principal purpose underlying the provision for removal of the principal office of the involved insurer either to San Francisco or Los Angeles and the consequent removal of the conservatorship proceeding thereto, is unquestionably the convenience of the commissioner who, as such, maintains an office and staff in both cities."

If this be a correct statement of the purpose of the statute, the Commissioner may take such action to serve his own convenience, though the result would be "to dissipate and ruin the business of a company subjected thereto". This thought of convenience of the Commissioner does not harmonize with the purposes of conservatorship. The controlling and dominating purpose of conservatorship is well expressed in the opinion on the same page (R. p. 35) as follows:

> "Such a proceeding contemplates, not the liquidation of the company involved, but a conservation of the assets and business of the company over the period of stress by the commissioner who thereafter yields the control and direction to the regular officers of the company."

Surely this Court would not uphold a statute which subordinated the interests of thousands of policyholders to the convenience of the Commissioner.

VI.

FEDERAL QUESTION PRESENTED IN TIME.

As the Federal question was first specifically urged upon the attention of the Supreme Court of the State in the petition for rehearing, heretofore referred to, it seems proper that the reasons for not earlier presenting it should be here stated.

Because of the Commissioner's declared intention to remove the principal office of Physicians Life Insurance Company from San Francisco to Los Angeles and to take steps to have transferred the pending proceeding from the Superior Court of the City and County of San Francisco to the Superior Court of the County of Los Angeles, on August 16, 1940 the insurance company presented to the Court in which this action was pending its petition praying that the Insurance Commissioner be restrained from removing the principal office of the concern from San Francisco to Los Angeles, and from taking any steps toward having the cause transferred for trial from San Francisco to Los Angeles, and after due notice the application was on August 26, 1940 heard and the injunction prayed for granted. Such injunction restrained the Commissioner

> "* * * from removing or attempting to remove the principal office or principal place of business of respondent corporation, or the books, records and assets of said respondent, or this proceeding, from the City and County of San Francisco to the City of Los Angeles, or otherwise, or at all." (R. pp. 19, 21-22.)

The application was made upon the contention that Section 1040 of the Insurance Code did not authorize such removal of the principal office, or of such transfer of the proceeding. At the hearing it was contended that Section 1040 authorized the removal of such proceedings from any county in the State, except San Francisco and Los Angeles, to either San Francisco or Los Angeles, at the option of the Commissioner. It was there shown that Section 1040 was an amendment of a statute of the State, theretofore in force, which authorized the removal of such causes to the Superior Court of the City and County of San Francisco, and that the amendment enlarged the privilege of removal so that such removal could be made to either San Francisco or Los Angeles. The trial Court so construed Section 1040 and issued its injunction accordingly. Such construction left the cause to be tried in the Superior Court of the City and County of San Francisco and continued the office in San Francisco, thus maintaining in that respect the status quo without subjecting the insurance concern to the prejudice, detriment and loss that would result from such removal and transfer. That construction gave to the statute a meaning in harmony with due process and avoided a construction which would conflict with the due process provision of the Federal Constitution.

This construction of Section 1040 by the trial Court was, so far as we are advised, the first time such section, or any similar section, had ever been construed by any Court.

When the proceeding, the judgment in which this Court is now asked to review, came on for hearing, such proceeding was heard upon the issues raised by respondent's return therein. (R. pp. 20-26.) In such return, the application for injunction, and the injunction granted in the original proceeding, were referred to, and in reference thereto it was said (R. p. 22):

> "The entire matter was heard by Honorable Frank T. Deasy, one of the Judges of the Superior Court in and for the City and County of San Francisco, and upon the conclusion of the arguments of respective counsel the matter was submitted to said Judge for decision and said Judge did thereupon and immediately render its decision, directing that the injunction prayed for be granted, and among the reasons stated for such conclusion was the opinion of the Court that Section 1040 of the Insurance Code did not authorize or empower the Insurance Commissioner to remove the principal office of Physicians Life Insurance Company from San Francisco to the City of Los Angeles, and that said Section did not authorize or empower the Court to direct its Clerk to transmit the papers filed in said proceeding to the Clerk of the Superior Court of the County of Los Angeles."

In this proceeding respondent contended that the construction given to Section 1040 by the trial Court was the true construction and did not anticipate or apprehend that the Supreme Court of the State would so construe the section as to bring it in conflict with the due process clause of the Federal Con-

stitution. The construction adopted by the trial Court served all the interests of justice, was in harmony with the constitutional provision, in no manner disturbed the original proceeding and preserved, in so far as possible, the status quo.

The construction placed upon the section by the trial Court was fully supported in argument by reason and by authority, and respondent believed and had every reason to believe that the construction adopted by the trial Court was correct and that the Supreme Court would not take a different view.

In the petition for rehearing (R. pp. 54-55), this question of construction is discussed and the brief theretofore filed with the Court was referred to as follows:

> "This particular question is discussed in the brief presented in behalf of this respondent on pages 5 to 15, both inclusive. To repeat that presentation here would extend this petition to unnecessary length, but we earnestly ask the Court to consider that portion of the brief to be a part of this petition and to read it as though it were copied herein."

At the pages referred to the question of construction is further discussed and it was said (R. p. 55):

> "If the power to remove from San Francisco is now possessed by the Commissioner it came to him through the amendment of Section 12 of the 1919 Liquidation Act, now Section 1040 of the Insurance Code. That amendment was designed to and did give to Los Angeles the same status under Section 1040 as San Francisco had

> under Section 12 of the 1919 Liquidation Act. It was designed to and did enlarge the power of the Commissioner by enabling him to legally transfer to either of two counties, where before he could transfer to but one. This enlargement of power was accomplished by the addition of the words 'or to the city of Los Angeles.'
>
> "The 1919 Act authorized the removal of 'the principal office * * * to the City and County of San Francisco'. The amended Act, now Section 1040, authorizes the removal of 'the principal office * * * to the City and County of San Francisco, or to the City of Los Angeles,' and the added words 'or to the City of Los Angeles' cannot by any stretch or torture be made to mean 'from the City and County of San Francisco,' and there is no other language imported into the law by the amendment which can achieve that purpose. The Commissioner did not have the power prior to the amendment to transfer from San Francisco and the amendment does not give him that power."

We do not complain of the well established rule that when a Federal question is not involved, the construction of local statutes by the highest Court of the State will not be disturbed by this Court.

Our contention is in harmony with the law, which is likewise well settled, that when a Federal question is involved this Court is not so bound by the construction placed upon the statutes by the State Court.

The rule upon which we here rely was clearly stated in *Scott v. McNeal,* 154 U. S. 34, as follows:

> "Upon a writ of error to review the judgment of the highest court of a state upon the ground that the judgment was against a right claimed under the Constitution of the United States, this court is no more bound by that court's construction of a statute of the Territory, or of the state, when the question is whether the statute provided for the notice required to constitute due process of law than when the question is whether the statute created a contract which has been impaired by a subsequent law of the state, or whether the original liability created by the statute was such that a judgment upon it has not been given due faith and credit in the courts of another state. In every such case, this court must decide for itself the true construction of the statute." (Citing cases.)

That the Federal question was raised in time is supported by many authorities and we cite *State of Missouri etc. v. Gehner,* 281 U. S. 313, where it was held that the Federal question was presented in time, though first presented in the petition for rehearing.

In *Saunders etc. v. Shaw etc.,* 244 U. S. 317-320, it was held that the Federal question was presented in time, though first raised in the assignment of errors. It was there said:

> "Of course ordinarily that would not be enough. But when the act complained of is the act of the supreme court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the

party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision of the case before his evidence was heard, and therefore was not bound to ask a ruling or to take other precautions in advance."

In *American Surety Co. v. Baldwin,* 287 U. S. 156, the Federal question was first presented in a petition for rehearing and the Court held that it was not presented in time because there had been ample opportunity to present it earlier. But in the opinion at page *164* it is said:

"This is not a case where, as in Saunders v. Shaw, 244 U. S. 317, 320, 61 L. ed. 1163, 1165, 37 S. Ct. 638, the federal claim arose from the unanticipated disposition of the case at the close of the proceedings in the state Supreme Court. Compare Ohio ex rel. Bryant v. Akron Metropolitan Park Dist., 281 U. S. 74, 79, 74 L. ed. 710, 715, 66 A.L.R. 1460, 50 S. Ct. 228. Nor is the federal claim based, as in Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U. S. 673, 678, 74 L. ed. 1107, 1112, 50 S. Ct. 451, upon the unanticipated act of the state Supreme Court in giving to a statute a new construction which threatened rights under the Constitution. Compare Missouri ex rel. Missouri Ins. Co. v. Gehner, 281 U. S. 313, 320, 74 L. ed. 870, 875, 50 S. Ct. 326."

In *Great Northern R. Co. v. Sunburst Oil & Ref. Co.,* 287 U. S. 358, the Federal question was raised by petition for rehearing. The opinion of the Court refers to the general rule to the effect that the Federal question should be presented prior to the deci-

sion, but held that the question was there timely raised, and falls within one of the exceptions to the general rule.

A very interesting case upon this subject is *Angelo Herndon v. State of Georgia,* 295 U. S. 441. In this case it was sought to raise the Federal question in the petition for rehearing and the Court held that, under the facts of that case, the Federal question was not presented in time. This was a Georgia case and it appears that the question which was sought to be raised in the petition for rehearing had been decided adversely to petitioner's contention in an earlier case, and in the prevailing opinion it was said:

> "Appellant, of course, cannot plead ignorance of the ruling in the Carr case, and was therefore bound to anticipate the probability of a similar ruling in his own case, and preserve his right to a review here by appropriate action upon the original hearing in the Court below."

It is significant too, that a dissenting opinion was presented by Justice Cardozo, Justices Brandeis and Stone concurring. The dissent was upon the ground that the question had been raised in time. The case is cited here mainly because it is perhaps the latest case upon the subject and the authorities were reviewed at length in both the prevailing and dissenting opinion.

We think it is clear that these authorities amply support the contention that in this case the Federal question was timely raised.

CONCLUSION.

It is respectfully submitted:

(a) That public welfare, as well as the interests of the parties to this proceeding and of all parties affected thereby, will be best served by the granting of this petition; and

(b) That writ of certiorari should be granted and the decision of the Supreme Court of the State of California reviewed and reversed.

Dated, San Francisco, California,
April 11, 1941.

U. S. WEBB,
HESTER WEBB,
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